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SPOILER ALERT: HOW TO MANAGE NDA BREACHES IN THE ENTERTAINMENT INDUSTRY

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Spoiler Alert: How To Manage NDA Breaches In The Entertainment Industry

Nothing is more frustrating than when a member of a project leaks key details about an upcoming film, game release, album, talent decision, or other major production. And if those moves violate a non-disclosure agreement, they create an actionable situation for your legal team. What should you do when talent or employees violate an NDA and how can you mitigate the damage? This Insight will cover practical steps for entertainment employers to respond when an NDA is broken.

Setting the Stage

In general terms, an NDA (non-disclosure agreement) is a contract that prohibits a party from disclosing specific confidential information shared during a business or employment relationship.

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“What we focus on is protecting not just specific data, but the reputations and privacy of the talent and clients that entertainment companies represent, manage, or work with on projects. But, there is also business confidential information to consider, just like any other business.”



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Non-disclosure pacts in general industry typically seek to protect confidential information and trade secrets: operations, pricing, margins, customer relationships, or inventions. And just like any other company, entertainment employers also have confidential business information to protect. This may include release dates, marketing budgets, and which actors or musical artists are connected to which projects. That information is often top secret until it's ready to be released, because the timing of disclosure is part of the marketing strategy.

“What we focus on is protecting not just specific data, but the reputations and privacy of the talent and clients that entertainment companies represent, manage, or work with on projects,” said FP’s Bob Yonowitz, a partner in the Irvine office. “But, there is also business confidential information to consider, just like any other business.”

But NDAs in the entertainment industry also cover certain information unique to the entertainment context. For example, they are often tailored to address privacy protections and intimate information that an assistant or other employees may learn.

And while NDAs place legal limits on what entertainment workers can share, they are not across-the-board gag orders. What information is protected typically varies by employee and their role in the production. For example, restrictions for talent or an actor may be different than the restrictions for their assistants, the latter of which may have access to sensitive information (like the talent’s address or phone number).

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The real challenge is controlling the release of that information and preventing leaks. The first step is identifying what information is actually protectable: artist-related information, internal business information, or both.

Key Components of a Strong NDA

Regardless of industry, there are some common traits shared by all strong NDAs.

- **Clear definitions of what is confidential** (and often what is *not*, like publicly available information). For example, talent's personal cell numbers, assistants, children's contacts, and similar information are confidential. Part of the drafting approach is to describe the realm and the need for confidentiality, then define categories of information that capture it.
- **Setting permitted uses** of the information.
- **Establishing the duration** of the confidentiality obligation.
- **Providing remedies for breach**, typically injunctive relief and/or damages if someone discloses improperly.

Want to learn more about NDA's? [Check out FP's Primer For Deploying Legally Sound Non-Disclosure Agreements](#)

Practical Tips For Crafting an Entertainment Industry NDA

Putting together an NDA, especially involving talent, requires a careful balance. The key is to define very clearly what information is being protected and for how long, without disclosing the actual protected information in the agreement itself.

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**CHRISTOPHER
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– Regional Managing Partner

For example, the agreement may say not to disclose contact information, family information, activities, appointments, and similar information about company talent. Entertainment companies are entrusted with protecting the image, likeness, and activities of the talent they work with, and that information has tremendous value.

While it’s important to be specific about what information is protected in the agreement, keep in mind that some states have also enacted laws restricting what can be included in NDAs, or require certain limitations. “A big mistake employers make is assuming one version works everywhere. It doesn’t,” said Chris Stief, Regional Managing Partner of the FP’s Portland office and a partner in the Philadelphia office. “Some states require a durational limit on confidentiality provisions. Most states don’t, but some do.”

Some court decisions have invalidated agreements for being too restrictive in their state even if they would be enforceable elsewhere. In other states, taking a broader approach to how you describe confidential information would not necessarily be fatal for the NDA. If you’ve made a good-faith effort to describe the covered information, some courts will typically enforce it or narrow its application rather than throw it out altogether.

Limits and Required Carveouts

A key issue that frequently comes up with the enforcement of NDAs is whether exceptions for protected disclosures conflict with labor and anti-retaliation rights.

- An NDA cannot lawfully stop someone from reporting a crime, cooperating with law enforcement, making legally required disclosures, or giving evidence to a court.

- Moreover, overly broad confidentiality language can run afoul of federal labor law if it discourages staff from discussing the terms and conditions of their employment.
- Federal law also limits enforcement of pre-dispute NDAs and non-disparagement clauses tied to sexual assault or sexual harassment disputes.
- And federal agencies can impose hefty penalties on employers who fail to include certain whistleblower protection language in their agreements.

It's also important to review state law where you're operating. Some states, like California and New York, have enacted more restrictions narrowing the use of confidentiality and settlement terms in workplace harassment and discrimination matters.

How to Respond to a Breach

When an entertainment NDA is violated, the usual outcome is a civil breach-of-contract dispute that can lead to money damages, or court orders to stop the leak, among other consequences. Remedies depend on the sensitivity of the information and the timing of the breach.

Step 1: Studios, producers, labels, and talent teams generally start by sending a cease-and-desist or demand letter requiring the employee to stop sharing information, delete posts, and sometimes return materials. These steps are less expensive and disruptive than litigation.

Step 2: If the employee ignores the cease-and-desist letter or if the information is so sensitive that you need to move immediately, consider requesting a temporary restraining order. If you go that route, especially with private or talent-related information, also consider sealing the court record to prevent further leaks by the media. There's a balancing act between speed and privacy: how quickly do you need to enforce your rights, and how much do you want to expose in the public record? Otherwise, you end up making public the very information you were trying to keep secret.

Step 3: File a civil lawsuit for breach of contract seeking:

- **Compensatory damages** for proven losses tied to the leak (lost revenue, added security or reshoot costs, reputational harm).

- **Liquidated damages** if the NDA specifies a pre-set penalty for disclosure; many entertainment NDAs include these clauses.
- **Injunctive relief** (a court order) to stop further disclosure and, in some cases, to force removal of already-posted material.
- **Attorneys' fees and costs** where the NDA includes a fee-shifting clause, which is common in industry form agreements.

Keep in mind: Every matter involving NDAs is different. Before taking any of the suggested steps outlined in this Insight please consult your attorney.

Act Quickly

Normally, if someone has already disclosed the information publicly, you probably won't be able to get it back. Remedies for these breaches are often unsatisfying. If the information is personal and it spreads quickly online, it may be impossible to fully undo the harm.

The best you can often do is stop further disclosure. In these situations, involve crisis communications or strategic communications early to get ahead of the issue and manage the message. For assistance with responding to a leak of sensitive or confidential information, reach out to [FP's Reputation and Crisis Management Team](#).

Conclusion

We will continue to monitor updates on state and federal NDA policies, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. If you have questions about your NDA, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Employee Defection and Trade Secrets Practice Group](#).